Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 13, 1995

Honorable Carole Keeton Rylander
Chair
Railroad Commission of Texas
P.O. Box 12967
Austin, Texas 78711-2967

Open Records Decision No. 635

Re: Whether the appointment calendars used by public officers or employees constitute public information subject to the Texas Open Records Act and related questions (RQ-720)

Dear Commissioner Rylander:

Your predecessor as chair of the Railroad Commission of Texas (the "commission") asked this office to determine whether the appointment calendars used by a member of the commission and an employee in her office are public records subject to the Texas Open Records Act[1] (the "act"), chapter 552 of the Government Code.[2] If we determine that the appointment calendars, or any part of them, are public records, the commission believes that some entries in the calendars must be withheld under section 552.101 of the Government Code. The commission also seeks to withhold one note regarding a telephone call received on the number 800-RRC-Mary.

The commission received an open records request for information including "[a]ll appointment schedule books of Commissioner Nabers and Carol Nasworthy maintained at the [commission]." We are informed that former Commissioner Nabers had two

---

[1]We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (to be codified as amendments to Gov't Code ch. 552). However, the amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, . . . apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142. A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.* The request for information at issue was received by the commission prior to September 1, 1995.

[2]The commission member and the employee are no longer with the commission.

appointment calendars[3] containing handwritten notes about her weekly schedule. She acquired one of the appointment calendars before her appointment to the commission, and she purchased the other one with her own money after her appointment to the commission. Some notes in the appointment calendars relate to commission activities, such as the commission's weekly conferences, while other notes relate to personal activities. You indicate that some of the latter notes relate to medical appointments. An employee assigned to do scheduling for the commissioner made the entries in each book.

Ms. Nasworthy, a commission employee who worked in former Commissioner Nabers' office, used one appointment calendar that she purchased with her own money and maintained herself. The commission's request letter states that the appointment calendar "primarily contains personal appointments, including medical appointments, and other events and activities unrelated to the Commission although some events relating to the Commission are noted." You have provided us with copies of pages from each of the three calendars. Our examination of these pages shows that each calendar does include notations of both commission-related and personal appointments.[4]

The same request also asked for "[a]ll available records relating to the telephone number 800-RRC-MARY including both billing/activity reports and notes or logs kept by staff answering the line." Your predecessor indicated that the commission has made most of these records available to the requestor, but that it wished to withhold one note addressed to a person working in former Commissioner Nabers' office from the assistant director of the Oil and Gas Division regarding a call received on the 800-RRC-MARY number. The commission's request letter contended that sections 552.101 and 552.111 of the Government Code except the note from required public disclosure.

Appointment Calendars

The commission requests our determination on whether the appointment books are public information under the act, and, therefore, subject to inspection by a member of the public. The commission also asks whether personal medical information contained in the appointment books is excepted from disclosure pursuant to section 552.101 of the Government Code.

---

[3]Although the requestor asked for "appointment schedule books," we will use the term "calendars" or "appointment calendars," which describe the sample records submitted to us.

[4]We assume that the calendar excerpts you have sent us and the facts you have provided truly represent the calendars as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). We do not reach, and therefore do not authorize the withholding of, any information that differs substantially from that before us.

The commission seeks to withhold the appointment calendars in their entirety on the grounds that they are not public records subject to the act. Its brief argues that the calendars are the personal notes of former Commissioner Nabers and Ms. Nasworthy rather than documents that contain information collected, assembled, or maintained by a governmental body. It also argues that former Commissioner Nabers' appointment calendars contain information collected and maintained by an individual commissioner of the Railroad Commission, not by the commission itself.

We will address the latter argument first. Information does not fall outside of the act simply because an individual commissioner, rather than the commission as a whole, possesses it. Records that clearly relate to official business are public records subject to the act regardless of whether an individual member of a governmental body, the governmental body's administrative offices, or the custodian of records holds the records. Open Records Decision No. 425 (1985) at 2 (overruled on other grounds by Open Records Decision No. 439 (1986)). If a governmental body could withhold records relating to official business simply because they are held by an individual member of the governmental body, it could easily and with impunity circumvent the act merely by placing all records relating to official business in the custody of an individual member. The legislature could not have intended to permit governmental bodies to escape the requirements of the act so easily. *Id.*

Next, we consider the commission's argument that the calendars are the personal notes of former Commissioner Nabers and Ms. Nasworthy rather than documents that contain information collected, assembled, or maintained by a governmental body. Section 552.021 of the Government Code defines public information subject to the act as follows:

> (a) Information is public information if, under a law or ordinance or *in connection with the transaction of official business*, it is collected, assembled, or maintained:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 597, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 2, 1995 Tex. Sess. Law Serv. 5127, 5129 (deleting definition of "public information" from Gov't Code § 552.021 and adding definition to § 552.002) (emphasis added); *see supra* note 1.

The commission argues that Open Records Decision Nos. 77 (1975), 116 (1975), and 145 (1976) require us to conclude that the appointment calendars are not subject to the act. In these early opinions, this office interpreted the language in section 552.021

to mean that handwritten "personal notes" are not public information subject to the act when they are in the sole possession of a public official or employee and are made by the public official or employee for his or her own personal use. *See* Open Records Decision Nos. 145 (1976) at 2, 116 (1975) at 2, 77 (1975) at 2. However, the mere fact that information is handwritten does not place it outside the scope of the act. Information is generally public information within the act when it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties, even though it may be handwritten or in the possession of one person. Thus, handwritten notes of a public meeting taken by the secretary of a governmental body as an aid to preparing the minutes of the meeting are public records subject to the act. Open Records Decision No. 225 (1979); *see also* Attorney General Opinion JM-1143 (1990) at 2 (tape recordings of commissioners court meetings made by county clerk to assist in preparation of minutes are subject to act, even if clerk used personally-owned tapes to record meetings). Correspondence relating to public business in the possession of school trustees is subject to the act even though it was sent to the trustees' home addresses. Open Records Decision No. 425 (1985) (overruled on other grounds by Open Records Decision No. 439 (1986)); *see also* Open Records Decision No. 332 (1982) (letters criticizing teacher that were delivered to trustees' home addresses but made available to principal were public records within act). Thus, subsequent opinions of this office have limited the statements about "personal notes" found in Open Records Decision Nos. 77 (1975), 116 (1975), and 145 (1976). *See* Open Records Decision Nos. 626 (1994), 450 (1986), 120 (1976). These rulings are not dispositive of whether the appointment calendars are records maintained "in connection with the transaction of official business," therefore subject to the act, or personal writings belonging to the individuals in their capacity as private persons.

In seeking guidance on the question before us, we turn to cases that have considered whether an employee's appointment calendar belongs to the individual employee or to the entity that employs him. The federal court of appeals in *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) had to decide whether calendars of government officials were "agency records" subject to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B). It concluded that appointment calendars kept by federal officials were not agency records under the specific facts of the case. *Bureau of Nat'l Affairs, Inc.*, 742 F.2d at 1496. Where "a document is created by an agency employee," the court found the following factors relevant in determining whether it was an agency record under FOIA: "[W]hether the document is in the agency's control, was generated within the agency, and has been placed into the agency's files." *Id.* at 1492. Also important was whether, and to what extent, the employee who created the document used it to conduct agency business. *Id.* The presence of personal items on a calendar, while not by itself taking material outside the ambit of FOIA, was relevant in determining the author's purpose in creating the calendar:

> FOIA's reach does not extend to such personalized documents absent some showing that the agency itself exercised control over or possession of the documents.

Id. at 1496.

Other federal courts have considered whether a company executive's appointment calendar is a corporate document or a personal document for purposes of discovery. While corporate documents are subject to discovery by the government, personal documents are protected against compelled production by the privilege against self-incrimination. *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 657 F.2d 5 (2d Cir. 1981), *on remand*, 522 F. Supp. 977 (S.D.N.Y. 1981); *see In re Grand Jury Proceedings*, 55 F.3d 1012 (5th Cir. 1995); *United States v. MacKey*, 647 F.2d 898 (9th Cir. 1981).

The following factors, although not an exhaustive list, are relevant to deciding whether calendars are essentially corporate or personal documents: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the corporation required its preparation; and whether its existence was necessary to or in furtherance of corporate business. *In re Grand Jury Proceedings*, 55 F.3d 1014 (stating agreement with *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 657 F.2d at 8).[5]

The trial court that heard *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, on remand concluded that a corporate executive's desk calendars were corporate documents, while his pocket calendars were personal documents. 522 F. Supp. at 982-84. The court first reviewed federal decisions that had addressed the status of calendars used by corporate officers, summarizing their findings as follows:

> A desk calendar that is useful for corporate business, used predominantly for that purpose, kept open in a company office during its use, and available as necessary to corporate personnel is a record of the sort that a company or regulatory agency might reasonably need and seek to examine; . . . and mandating production is unlikely to pose a substantial threat to the witness's interest in the privacy of his purely personal affairs.

Id. at 982.

---

[5]In addition, the ratio of personal to corporate entries was relevant to the nature of the calendar. "As a general rule, the greater proportion of personal entries, the more likely it is that the trier of fact could reasonably conclude that it was prepared, used, and maintained as a personal document." *In re Grand Jury Proceedings*, 55 F.3d 1012, 1014 (5th Cir. 1995).

The court stated that the desk calendars before it were used primarily for corporate business and their contents were overwhelmingly corporate, although some personal notations were made in them. *Id.* at 982-83. While they were in use, the calendars were left open on the executive's desk, and his secretary had access to them, and may have occasionally made entries in them. *Id.* at 983. The company had purchased the blank desk calendars used by the executive. *Id.* Based on these findings, the desk calendars were corporate documents.

Although the pocket calendars contained many company-related entries, they differed from the desk calendars in that they contained many personal entries. *Id.* at 984. The corporate executive used them to remind himself of religious activities and obligations, of medical appointments, and of personal meetings and duties. He kept them on his person at all times, taking them out at work to make entries about his schedule, and no one else had access to them. *Id.* at 985. The pocket calendars were not obtained from the company. *Id.* The court concluded that the pocket calendars were personal documents.

In addressing questions about the act, this office has been careful to distinguish between the provisions of the act and the rules of discovery. *See* Attorney General Opinions JM-1048 (1989), H-231 (1975); Open Records Decision Nos. 575 (1990), 551 (1990), 108 (1975); *see also* Gov't Code § 552.005. We have also held that the construction of the act is not governed by the provisions of FOIA, 5 U.S.C. § 552(b)(4). Open Records Decision No. 124 (1976). Thus, the federal cases we have discussed do not necessarily control our decision in the present case. Nonetheless, those cases are helpful because they deal in a concrete way with the distinction between an employee's personal document and a document belonging to the employer, by identifying various factors that are relevant to this distinction and applying them to specific appointment calendars.

We first address former Commissioner Nabers' calendars. We believe that her calendars are public records subject to the act as a matter of law. We base our conclusion on the following factors: the use of state resources to maintain the calendars, in this case a public employee other than the commissioner who maintains them as part of his or her job; the fact that the calendars are not in former Commissioner Nabers' sole possession but are accessible to another commission employee; and the presence of significant commission-related entries in the calendar pages we have seen. *See* Ethics Advisory Opinion No. 172 (1993) at 2 (concluding that legislator does not misapply state funds by directing state employee to keep track of his or her schedule).[6] To the extent that this

[6]A public employee must know his or her schedule, including personal appointments, to plan work-related activities effectively. Therefore, including personal appointments and activities on an appointment calendar used primarily to schedule work-related activities serves an official or work-related purpose. *Cf.* Ethics Advisory Opinion No. 172 (1993) at 2.

conclusion is inconsistent with Open Records Decision Nos. 116 (1975) and 145 (1976), these decisions are now specifically overruled. We conclude that both calendars belonging to former Commissioner Nabers are public records subject to the act. They must be released to the requestor unless one of the exceptions to required public disclosure applies to some or all of the information contained in them.

The facts about the maintenance and use of Ms. Nasworthy's calendar are significantly different from those relating to former Commissioner Nabers' calendars. Ms. Nasworthy also purchased the calendar herself, and, unlike the former commissioner, maintained the calendar herself and apparently had sole access to it.[7] We assume that no state resources were used to maintain Ms. Nasworthy's calendar, except possibly a de minimis portion of her own work day. A public employee may need to include work-related information on a personal calendar so that personal activities, such as medical appointments or lunchtime engagements, may be scheduled to avoid conflict with work-related responsibilities. As stated by the trial judge in one of the federal cases we have discussed:

> A private diary is made no less private because it contains material relating to an officer's corporate employment. Work is part of a person's life, and references to one's work activities will naturally tend to be included in an individual's records of activities.

In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, 522 F. Supp. at 984.[8] Based on the facts and assumed facts stated in this ruling, and on an examination of Ms. Nasworthy's calendar, we conclude that the calendar and the information she has written in it are her personal property and record, not a record of the Texas Railroad Commission. Thus, this calendar is not subject to the act. Of course, if information maintained on a privately-owned medium is actually used "in connection with the transaction of official business," such as recording the substance of commission-related appointments after they have taken place, it would be subject to the act.

---

[7]We do not know if Ms. Nasworthy kept her calendar with her at all times, or placed it on her desk. Even if she kept her appointment calendar at work, that does not necessarily convert it into a governmental document. A personal appointment calendar might be one of a number of personally-owned items that a public employee might keep at his or her work station, assuming that the presence of the item is not inconsistent with the employee's responsibilities. A public employee might keep a coffee mug, reference book, or other personally-owned items on his or her desk, and he or she might decorate walls and bulletin boards with diplomas, posters, photographs, news clippings, children's drawings, and other written, printed, or copied materials brought from home. An employee's personal property that contains or consists of written, printed, or copied material is not by its presence in the workplace converted into a public record.

[8]The inclusion of some personal matter with corporate documents did not change their nature. *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 522 F. Supp. 977, 1984 (S.D.N.Y. 1981).

Medical Information in Appointment Calendars

In the event that we found the appointment calendars to be public information, your predecessor argued that section 552.101 of the Government Code protects some of the information contained in them, specifically, medical information that is excepted from disclosure by common-law privacy.[9]

We agree that common-law privacy may except from disclosure medical information that could be found in an appointment calendar. Common-law privacy applies to information when its disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). To be excepted from disclosure by common-law privacy, information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) be of no legitimate public interest. *Id.* at 684-85.

Under the standard for common-law privacy, some, but not all, medically related information is excepted from required public disclosure. Open Records Decision No. 478 (1987) at 3. For example, common-law privacy does not protect the fact that a public employee is ill or injured; the mere fact of an illness or injury is not highly intimate or embarrassing. *See* Open Records Decision No. 600 (1992) at 7-8. Moreover, some specific information about an illness or injury is not highly intimate or embarrassing. In Open Records Decision No. 422 (1984) at 1, this office concluded that information revealing that an individual was the victim of a self-inflicted gun-shot wound was not highly intimate or embarrassing. The opinion reasoned that many self-inflicted gun-shot wounds are accidental, so that revealing the nature of the wound would not reveal any highly intimate information. On the other hand, this office also concluded that the governmental body could not release information that would reveal whether the self-inflicted wound was accidental or intentional. Releasing this information would necessarily indicate that some individuals were suffering from some sort of mental distress, which would be highly intimate or embarrassing. Open Records Decision No. 422 (1984) at 2. Other types of highly intimate or embarrassing medical information include information that relates to a drug overdose, acute alcohol intoxication, obstetrical care, gynecological illness, or convulsions or seizures. Open Records Decision Nos. 422 (1984) at 1, 237 (1980) at 1.

---

[9]You also argue that constitutional privacy excepts from disclosure any medical information contained in the calendars. However, the constitutional privacy rights of public officials and employees are limited in scope. Open Records Decision No. 212 (1978) at 3. Therefore, we do not believe that any medical information not excepted from disclosure by common-law privacy would be excepted from disclosure by constitutional privacy.

You state that the calendars used by former Commissioner Nabers include notations of medical appointments. However, we do not find any references to any medical information on the calendar pages you provided for review. Some of the entries on the sample pages are illegible, and none of the entries that we can read appear to contain any medical information. We cannot determine whether common-law privacy permits you to withhold any of the information contained in the pages before us. Furthermore, we understand that other portions of the calendars contain medical information that you believe is excepted from disclosure under constitutional or common-law privacy. Because determining whether constitutional or common-law privacy permits you to withhold any information contained in the calendars must be done on a case-by-case basis, we must review all the information that you believe should be excepted from disclosure under either constitutional or common-law privacy. If, after you have received this opinion, you continue to believe that the appointment calendars of former Commissioner Nabers contain medical information excepted from disclosure under section 552.101, please submit to this office a request for a ruling regarding that particular information. You must, however, release all of the remaining portions of former Commissioner Nabers' calendars.

Note of Call Received on the 800-Number

Finally, you seek to withhold under sections 552.101 and 552.111 of the Government Code one note addressed to a person working in former Commissioner Nabers' office from the assistant director of the Oil and Gas Division regarding a call received on the 800-RRC-MARY number. You refer to the highlighted information in the note, contending that some of it is excepted from disclosure by common-law privacy under section 552.101, while some of the highlighted information in paragraph 1 and all of the information in paragraph 3 are protected by section 552.111 because they reflect the writer's opinion and evaluation of the information provided by the caller.[10]

As we noted earlier, common-law privacy excepts from disclosure information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate public interest. *Industrial Found.*, 540 S.W.2d at 684-85. In this case, none of the information you are seeking to withhold is highly intimate or embarrassing. This office specifically concluded in Open Records Decision No. 579 (1990) that section 552.101 does not incorporate the common-law tort of false-light privacy. Therefore, common-law privacy does not except information from disclosure merely because it

[10]You also contend that the highlighted information is so intertwined with the other information in the note that the entire memorandum should be excepted from disclosure, but we have been able to separate the information that must be disclosed from the information that may be withheld from the public.

might damage the reputations of the individuals named. Furthermore, some of the information is of a legitimate interest to the public. It concerns allegations against an oil and gas operation regulated by the commission. The public has a legitimate interest in information regarding complaints against entities that are regulated by the state. Open Records Decision No. 525 (1989) at 6.

Section 552.111 excepts from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section protects only advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue; it does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. We conclude that section 552.111 excepts from disclosure the portion of the note we have bracketed, which expresses the opinion of a commission employee reflecting the policymaking processes of the commission. The remainder of the information you have highlighted consists solely of facts and written observations of facts. Thus, you may not withhold this information under section 552.111.

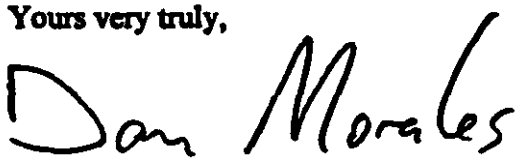
SUMMARY

An appointment calendar purchased by a public official or employee with private funds is information subject to the Open Records Act when another public employee maintains the calendar as part of his or her job. Under these circumstances, the calendar cannot be considered a handwritten note in the sole possession of a public official or employee and made by that public official or employee for his or her own personal use. Furthermore, information, including an appointment calendar, does not fall outside the definition of public information in the Open Records Act merely because an individual member of a governmental body possesses the information rather than the governmental body as a whole.

The appointment calendar maintained by an employee for a public official is subject to the Open Records Act in its entirety, including the entries regarding personal appointments and activities. Common-law privacy may except from disclosure some medical information that may be found in the requested appointment calendar. To be excepted from disclosure by common-law privacy, medical information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and be of no legitimate public interest. The determination of whether particular information is excepted from disclosure by common-law privacy must be made on a case-by-case basis.

Under the facts stated in this decision, the appointment calendar purchased by a Railroad Commission of Texas employee with personal funds, that has been solely maintained and used by the employee, and that primarily contains personal appointments, is not public information subject to the Open Records Act even though some commission-related entries may be included in it.

Yours very truly,



DAN MORALES
Attorney General of Texas

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

SANDRA L. COAXUM
Chief, Open Records Division

Prepared by Susan L. Garrison
Assistant Attorney General